

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
240-777-6600

**Case No. A-5959
APPEAL OF ELLIOTT GITLIN, et al.**

OPINION OF THE BOARD

(Hearing held February 25, 2004)
(Effective Date of Opinion: June 11, 2004)

Case No. A-5959 is an administrative appeal filed by Elliott Gitlin and the Cabin John Citizens Association (the "Appellants"). The Appellants charge error on the part of the County's Department of Permitting Services ("DPS") in issuing Building Permit No. 282397, dated June 11, 2003, for the construction of an addition to a business establishment on the property located at 7607 MacArthur Boulevard, Cabin John, Maryland (the "Property").

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board held a public hearing on the appeal on February 25, 2004. Mr. Gitlin appeared pro se. Assistant County Attorney Malcolm Spicer represented DPS.

Decision of the Board: Administrative appeal **dismissed**.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 7607 MacArthur Boulevard in Cabin John, is a C-1 zoned parcel identified as Lot 101 of the Cabin John Park subdivision. The Property is the site of a 1,689 square foot commercial establishment known as "Captain's Market." On June 11, 2003, DPS issued Building Permit No. 282397 to Mr. Sung Hoon Park to permit the construction of a 1,720 square foot addition to be used as a "clothes pick-up store" on the Property.

2. Construction of the addition began in late August 2003. The building permit was posted in the window of the Market. Elliott Gitlin, an architect who works in the Cabin John community, and Helen Daniels, a member of the Cabin John Citizens Association ("CJCA"), testified that the permit was not conspicuous and that they did not notice it until construction began. This testimony is corroborated in a letter from Burton Gray, President of CJCA, addressed to the Board dated February 24, 2004.

3. On September 10, 2003, Mr. Gitlin wrote a letter to Mr. Hadi Mansouri, Senior Engineer in the Division of Building Construction of DPS, in which Mr. Gitlin indicated that he had reviewed the site plan filed with the building permit application for the addition and met with a DPS representative. The letter asks Mr. Mansouri to respond to several questions about the zoning, setbacks, off-street loading space, and green space provided on the plan. Mr. Gitlin concluded in his letter that the plan did not comply with several requirements of the Zoning Ordinance.

4. On September 29, 2003, Mr. Gray sent a letter on behalf of the CJCA to Mr. David Niblock of DPS. The letter states that the CJCA had voted to ask the County to respond to Mr. Gitlin's September 10 letter.

5. On October 9, 2003, Mr. Gitlin and Mr. Gray met with Mr. Niblock and Ms. Susan Scala-Demby, Permitting Services Manager for DPS. According to Mr. Gray, during this meeting the County personnel responded to most of the issues raised in the September 10 letter. According to Mr. Gitlin, Ms. Scala-Demby told him that his time to appeal to the Board was "open" until she answered all of his questions in writing. According to Mr. Gray, Ms. Scala-Demby told him that she was unsure as to the deadline for appeal of the permit.

6. By letter dated November 7, 2003, Ms. Scala-Demby responded in writing to Mr. Gitlin's September 10 letter.

7. Mr. Gitlin filed this appeal to the Board on December 12, 2003.

CONCLUSIONS OF LAW

1. Section 8-23 of the Montgomery County Code authorizes any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of DPS to appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued. Section 59-A-43(e) of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be considered *de novo*. The burden in this case is therefore upon the County to show that the building permit was properly issued.

2. As a preliminary matter, DPS moved to dismiss the appeal because the Appellants filed it more than 30 days after the building permit was issued. The Appellants counter that (a) they did not have notice of the building permit because it was not conspicuously posted, (b) they were delayed in filing the appeal while they waited for a complete response from DPS to Mr. Gitlin's September 10 letter, and (c) they reasonably relied on Ms. Scala-Demby's assurance that their appeal time was not tolled. For the reasons stated below, we find that the Appellants' appeal was not timely filed and that it must therefore be dismissed.

3. This Board's authority to hear administrative appeals under Section 8-23 is derived from Article 25A, Section 5(U) of the Annotated Code of Maryland, which authorizes boards of appeal to hear and decide, among other things, appeals concerning "the *issuance*, renewal, denial, revocation, suspension, annulment, or modification of any license, *permit*, approval, exemption, waiver, certificate, registration, or other form of permission or of any adjudicatory order" (italics added).

In United Parcel Service, Inc. v. People's Counsel for Baltimore County, 336 Md. 569, 650 A.2d 226 (1994), the Maryland Court of Appeals defined the scope of the Board's authority under Article 25A, Section 5(U). In that case, neighboring landowners appealed from the zoning commissioner's letter responding to their objection to his previous approval of a building permit application. In his letter, the commissioner explained and defended his prior decision to approve the building permit. The Court held that the commissioner's response letter was not an "approval" or "permission," but merely the reaffirmation of his prior approval or decision. The Court reasoned that the words of the State law "obviously refer to an operative event which determines whether the applicant will have a license or permit, and the conditions or scope of that license or permit ..." The court found that the appealable event occurred when the building permit was approved and issued, not when the commissioner sent his explanatory letter. "If this were not the case an inequitable, if not chaotic, condition would exist. All that an appellant would be required to do to preserve a continuing right of appeal would be to maintain a continuing stream of correspondence, dialogue, and requests ... with appropriate departmental authorities even on the most minute issues of contention with the ability to pursue a myriad of appeals ad infinitum." 336 Md. at 584, *quoting Nat'l Inst. Health Fed. Cr. Union v. Hawk*, 47 Md. App. 189, 422 A.2d 55, 58-59 (1980) *cert. denied* 289 Md. 738 (1981).

In this appeal, the gravamen of the Appellants' case is that in several respects the site plan for the proposed addition on the Property does not comply with the Zoning Ordinance. DPS had decided, however, that the site plan complied with the zoning requirements when it approved the building permit. The "operative event," then, for the purposes of this appeal, occurred when DPS issued the building permit on June 11, 2003. It was therefore incumbent upon

the Appellants to contest these issues by filing their appeal, if at all, within 30 days after that date. DPS's subsequent dialogue and correspondence with the Appellants, including Ms. Scala-Demby's November 7 letter,¹ were efforts to explain and confirm that decision, and may not be regarded as "decisions" in and of themselves. If this were the case, we would invite the same type of mischief and chaos that the Court of Appeals was attempting to prevent in the *UPS* decision. If an applicant or any interested person could generate an appealable decision simply by writing a letter to the agency and demanding a response, then it could easily maintain a continuing right of appeal by persisting in a continuous stream of correspondence, dialogue and requests. The development process would be virtually held hostage.²

4. The Appellants' contention that they should be allowed to maintain their appeal because they were not properly notified of the issuance of the building permit is without merit. First, the Montgomery County Code does not require public notice of a building permit for a commercial property. See Section 8-25A. Moreover, the courts have held that, with regard to provisions substantially the same as Section 8-23, the 30-day time period for appeals is jurisdictional in nature and is not a statute of limitations. Consequently, the "discovery rule" applicable to statutes of limitations does not apply – that is, whether and when the Appellants became aware of the issuance of the permit is immaterial. The 30-day time for appeal begins on the date of issuance. "Where the notice of appeal was not filed within the prescribed period after the final decision from which the appeal was taken, the appellate tribunal had no authority to decide the case on its merits." United Parcel Service, Inc. v. People's Counsel for Baltimore County, 336 Md. at 580, 650 A.2d at 231; see, e.g., Dabrowski v. Dondalski, 320 Md. 392, 397-398, 578 A.2d 211, 214-215 (1990); Walbert v. Walbert, 310 Md. 657, 662, 531 A.2d 291, 293 (1987), and Miller v. Pinto, 305 Md. 396, 504 A.2d 1140 (1986). Accordingly, the Board's jurisdiction to hear this appeal ended 30 days after the permit was issued.

Even if we were to entertain the Appellants' argument, however, we would still be compelled to dismiss the case. The uncontroverted facts show that the Appellants became aware of the issuance of the permit in late August 2003. Mr. Gitlin soon thereafter obtained access to and reviewed the site plans for the addition in sufficient detail to write his September 10 letter concluding that the plans violated the Zoning Ordinance. It was at this point that the Appellants were clearly aware of the issuance of the permit and of any issues relating to it. They did not file their appeal until more than 90 days later. Their appeal was therefore untimely.

¹ We note that, even if we were to find that the November 7 letter marked an "operative event," the appeal was still untimely as it was filed more than 30 days after that date.

² Alternatively, DPS would be deterred from answering inquiries from interested persons, an equally unacceptable outcome.

5. Neither is it a compelling argument that the Appellants relied on Ms. Scala-Demby's representations that their appeal time was still pending. First, the testimony with respect to her statements are in conflict so that it is unclear whether she made any representations at all upon which the Appellants could reasonably rely. Even if she did, however, neither Ms. Scala-Demby nor any other County official (including this Board) has the authority to extend the 30-day period for appeals as established by law. In similar circumstances, Maryland's courts have consistently held that "everyone dealing with officers and agents of a municipality is charged with knowledge of the nature of their duties and the extent of their powers, and therefore such a person cannot be considered to have been deceived or misled by their acts when done without legal authority." Inlet Associates v. Assateague House Condominium Assoc., 313 Md. 413, 437, 545 A.2d 1296 (1988); see also Cromwell v. Ward, 102 Md. App. 691, 651 A.2d 424 (1995); City of Hagerstown v. Long Meadow Shopping Center, 264 Md. 481, 287 A.2d 242 (1972); Lipsitz v. Parr, 164 Md. 222, 164 A. 743 (1933). The *Inlet* Court added: "The doctrine of equitable estoppel 'cannot be . . . invoked to defeat the . . . enforcement of . . . ordinances, because of an error or mistake committed by one of its officers . . . which has been relied on by the third party to his detriment.'" *Id.* In other words, we may not compound any error DPS may have made by exercising jurisdiction that we do not possess.

6. Finally, the Appellants assert that the strict application of the 30-day appeal period places citizens and citizen groups such as the CJCA at a disadvantage because the complexity of the development process requires more time for them to gather and assimilate the information they need to determine whether an appeal is warranted. In this case, the Appellants claim, they in good faith waited for DPS to respond to their concerns before deciding to file their appeal. They are now penalized for the delay caused in part by DPS failure to respond.

While the Board sympathizes with the Appellants' plight, absent a legislative change we simply do not have the authority to extend the 30-day appeal period. We would note, however, that this is a case in which legal counsel would likely have benefitted the Appellants greatly. If the Appellants had first consulted with an experienced attorney, they could have been advised of their rights under the law. Armed with competent advice, they could have made an informed and perhaps more timely decision of how and when to pursue redress of the issues that concerned them.

11. For the foregoing reasons, we find that the appeal was not timely filed pursuant to Section 8-23 of the Montgomery County Code. The appeal in Case A-5926 is therefore **DISMISSED**.

On a motion by Member Louise L. Mayer, seconded by Member Angelo M. Caputo, and Chairman Donald H. Spence, Jr., Vice-chairman Donna L.

Barron, and Member Allison Ishihara Fultz in agreement, the Board voted 5 to 0 to dismiss the appeal and adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 12th day of June, 2004.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2-A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County on accordance with the Maryland Rules of Procedure.